In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-721

LUIS DISLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A five-count indictment returned in the United States District Court for the Southern District of New York charged petitioner and two others with having distributed and possessed cocaine hydrocloride with intent to distribute it and with having conspired to do so, in violation of 21 U.S.C. 841 and 846.

On July 30, 1971, petitioner and the two co-defendants entered pleas of not guilty. On October 5, 1971, following a hearing, petitioner's motion to suppress was denied. Later the same day, while represented by retained counsel, petitioner changed his plea to guilty

on two of the susbstantive counts (Pet. App. A8-A16).[1] At that time, the trial judge questioned petitioner as to his understanding of the charges and the constitutional rights he was waiving by pleading guilty (T. 15-16). Petitioner stated that he understood the charges and his rights. He was also questioned about the maximum penalty and indicated his awareness that a fifteen-year sentence could be imposed on each of the counts as well as an additional three-year term of probation (T. 16-17). Petitioner in addition stated that no promises had been made to him, and admitted having done the acts which formed the basis of the charges (T. 17-18). His plea was then accepted and sentencing was deferred so that a pre-sentence report could be prepared.

On November 18, 1971, petitioner was sentenced to concurrent terms of ten years' imprisonment on each of the two counts and a special parole term of three years. On November 29, 1971, petitioner's attorney filed a notice of appeal from the judgment of conviction (Pet. App. A6-A7).[2] On January 25, 1972, petitioner was then ordered to file his brief in the court of appeals on or before March 6, 1972, failing which his appeal would be dismissed.[3] On March 7, 1972, the court

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[1] The two co-defendants also changed their pleas to guilty.

[2] Petitioner asserts that almost immediately after his counsel filed the notice of appeal a dispute arose between them and that petitioner severed their relationship.

[3] On February 14, 1972, petitioner filed a motion to withdraw his plea of guilty and to vacate sentence pursuant to 28 U.S.C. 2255, alleging that his counsel had coerced him to change his plea of "not guilty" to "guilty" through the promise of a suspended sentence. On May 5, 1972, petitioner's trial counsel filed an affidavit

of appeals dismissed the appeal due to petitioner's failure to file his brief by the day specified (Pet. App. A5).

On August 4, 1972, petitioner, through newly retained counsel, filed a motion to vacate the order dismissing the appeal. He asserted that the grounds for appeal were that his plea was not voluntary and that the trial judge had not complied with Rule 11, Fed.R. Crim.P. (Pet. App. A2-A4). The court of appeals denied the motion (Pet. App. A1), and it is that denial that petitioner now asks this Court to review.

Whether to reinstate an appeal after a party has failed to comply with procedural requirements is a matter within the sound discretion of the court. See, *e.g., United States* v. *Lynch,* 419 F. 2d 386 (C.A. 4); Rule 31(c), Fed.R.App.P. In the instant case, the court did not abuse its discretion in declining to reinstate the appeal since petitioner had ample time in which to retain new counsel and file his brief between his discharge of his original counsel and the date set for filing the brief. Moreover the record—set forth at pp. A8-A16 of the petition—shows that the district judge carefully complied with all of the requirements of Rule 11 before he accepted the guilty plea.[4]

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denying the existence of any such promise. The district court denied the motion and an appeal is now pending before the Second Circuit, No. 72-1678.

[4] Insofar as this claim rests on the allegation that his counsel had promised him a suspended sentence, petitioner's appeal from the denial of his motion to vacate sentence on that ground is, as we have noted, presently before the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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